

HARVARD LAW RECORD

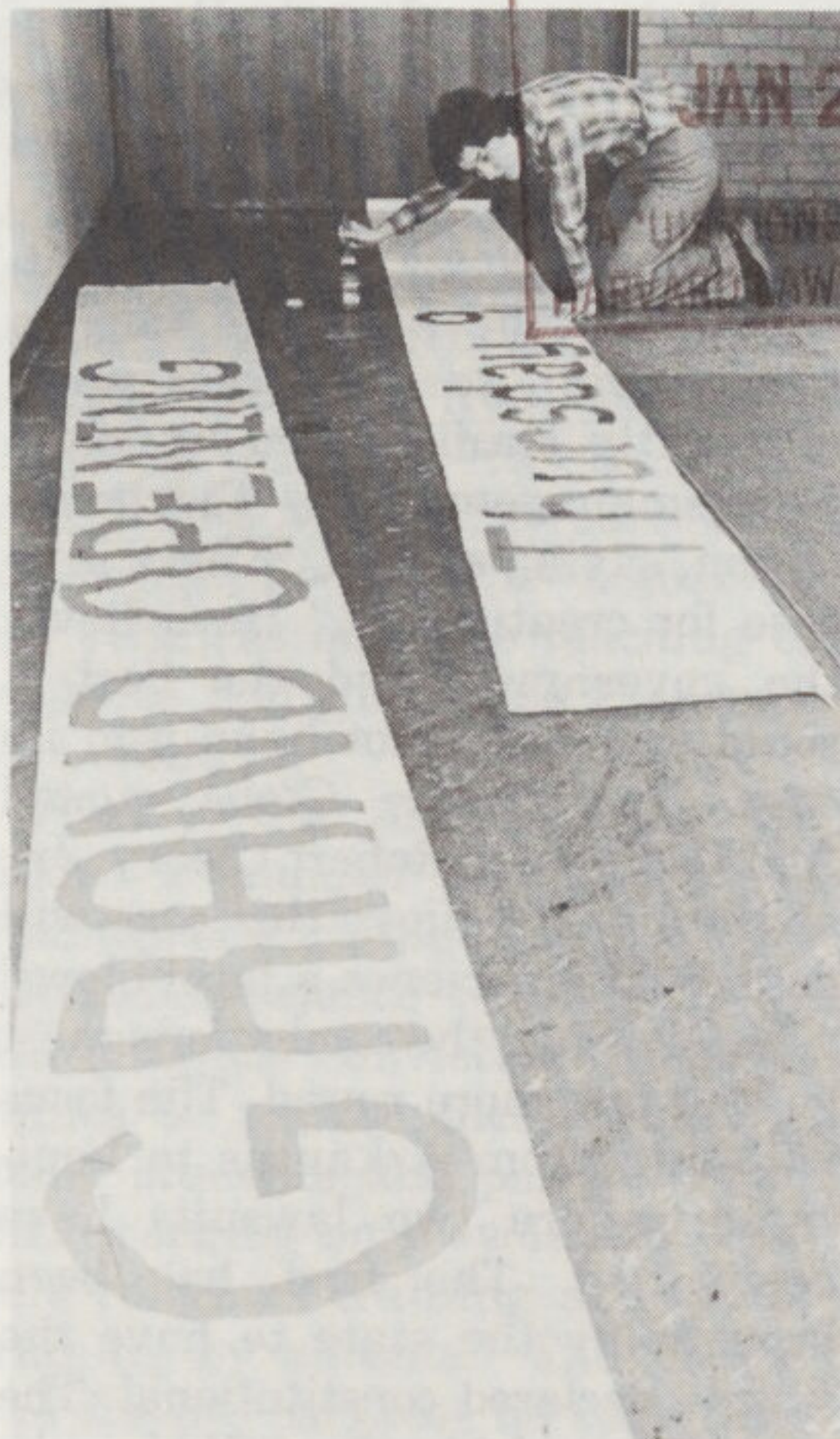
America's Oldest Law School Newspaper

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TWENTY-FIVE CENTS



John Morris

Revised Review Plan to Take Effect This Year

By John Morris

The *Law Review* voted 41 to 35 last Wednesday to adopt an affirmative action plan which will allow the *Review* to consider applicants' personal statements when it chooses its members. The plan, which will take effect this year, does not employ the quotas that provoked condemnation by the faculty and alumni when they were proposed last spring. The new plan also leaves out the so-called Yale provision, proposed by a *Review* committee in the fall (RECORD, v. 74, n. 7, Nov. 13, 1981, p. 1), which would have allowed students to

become members by writing notes which were accepted for publication.

The *Review* voted to form a new committee to investigate the feasibility of moving the writing competition to the spring of first year, a proposal first put forward by the *Review's* affirmative action committee this past fall. Unless the new committee finds the move to be "undesirable," the switch will be made in 1983.

The new plan departs from earlier proposals in two ways. First, in order for a student's grades to be considered in conjunction with

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Sign of the Times

Monday the refrigeration equipment was tested; Tuesday the cash register went in; Wednesday the room got a new coat of paint; and finally last night the Hark had a new pub. Above, Mandy Lowell paints the banner which hung in the entrance for the grand opening of the facility, christened "The Back Bench." Story and details on p. 6.

LSI Fate All But Sealed

By Rob Woolmington

The Reagan budget cuts have claimed a victim at Harvard Law School. It now seems virtually certain that the Legal Services Institute, HLS's experiment in blending practice with pedagogy, will shut down this summer.

Located in Jamaica Plain, the Institute served as classroom for Harvard and Northeastern law students, and as provider of legal services for the community's poor. It was created in 1979 as a new model of legal education; students spent their full third year at the Institute, studying and practicing with faculty. The demise of LSI will require Greater Boston Legal Services to restructure its organi-

zation to cover Jamaica Plain and surrounding neighborhoods, and it comes at a time when the HLS faculty is engaged in sharp debate about the future of clinical education here.

Interim Proposals

On Dec. 30, Dean Vorenberg circulated a memo to the faculty proposing that he negotiate with other local legal services offices to provide clinical supervision and experience for HLS students next year. The school would in turn contribute to the offices' budgets. These arrangements would be temporary: Vorenberg wrote that the placements, if secured, would not "pre-

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Creation Science Controversy Evolves:

By Brad Hudson

On Jan. 6, Federal District Court Judge William Overton overturned an Arkansas statute requiring public schools to give balanced treatment to the theories of "evolution science" and "creation science." In a 38-page opinion, Overton held that the law violated the First Amendment prohibition against the establishment of religion. In doing so, he rejected the claims of creationists that creation science is separable from religion, and concluded that the law's only real effect was to advance religion.

The Arkansas case is the latest round in a battle as old as Darwin's theory: What should the public schools teach about the origins of man, the earth and the universe? In the past, the battle lines were clearly drawn, with science trying to teach biological evolution in the schools, and religion fighting to keep it out.

But today the scope of debate has expanded from biology to almost every field of science. Debates sink into a morass of facts and figures with numerous interpretations. The sides are less clearly defined — creation is described as a science, while evolution is portrayed in religious terms. And the evolutionists are placed in the unfamiliar

role of trying to prevent the teaching of a point of view in the classroom.

"Balanced-Treatment" Act

At the center of debate is a law innocuously titled the "Balanced Treatment for Creation-Science and Evolution-Science Act." Based on a model bill designed to bring the teaching of creation science into the public schools, 18 states have introduced this type of legislation. However, only two, Arkansas and Louisiana, have enacted balanced treatment laws. The Arkansas law is no longer valid, but the Louisiana law is scheduled to go into effect this fall.

The core of the balanced treatment act does three things. First, it defines "creation science" as "scientific evidences for creation and inferences from those scientific evidences," and defines "evolution science" in the same terms. Second, it requires the public schools to give balanced treatment to both theories whenever either theory is taught, stressing that individual lectures or textbooks need not be balanced, but that lectures, textbook materials and library materials must be balanced as a whole. Third, it prohibits the use of religious instruction or reference to any religious writing.

Attorneys on both sides of the dispute interpret the results of the Arkansas case differently. Wendell R. Bird, whose clients include the Institute for Creation Research on the campus of Christian Heritage College in San Diego, feels the decision was constitutionally in error, but was not surprised at the outcome.

Mismanaged Case?

Bird asserted that the Arkansas Attorney General mismanaged the case, refusing the assistance of experts in First Amendment issues. "They spent 1/30th the money that the American Civil Liberties Union did, and 1/50th the time."

Bird also questioned the lengthy cross-examination into the religious beliefs of the creation science expert witnesses, stating that those beliefs are not relevant to the question whether creation science is a valid scientific theory. It was this cross-examination, including the admission of one state witness that he believed that UFOs are satanic manifestations, that badly damaged the credibility of creation science witnesses, at least in the eyes of the public.

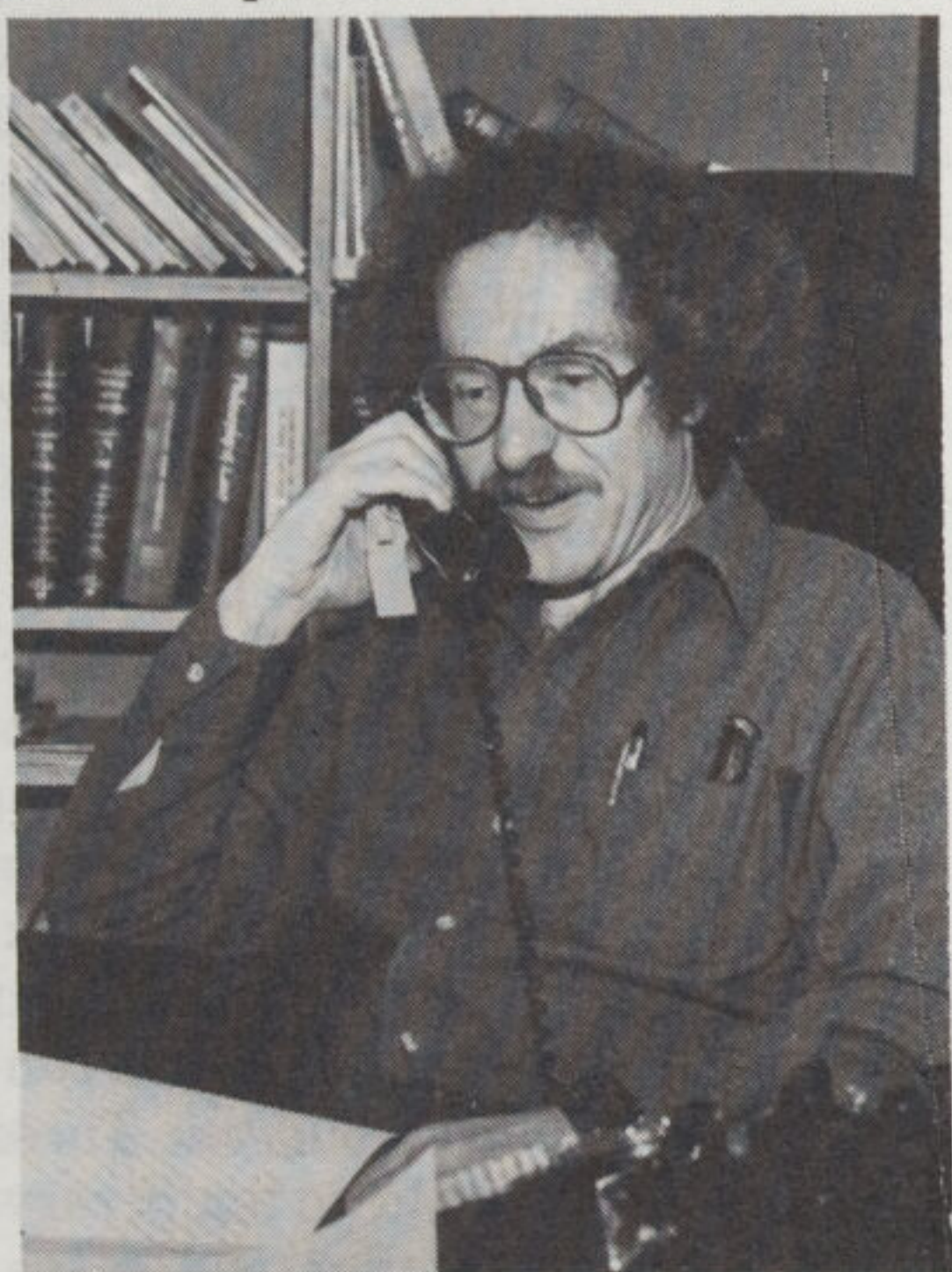
But Jack Novik, one of the attorneys for the ACLU in the Arkansas trial, sees the case much differently. He dismissed any claim of mismanagement by the prosecution, saying simply, "There is no case for creationism." He believes the government did the best it could, but could not have won its case. The *Boston Globe* quoted ACLU attorney Robert Cleary, Jr., as saying, "I believe this case will deal creation-science a fatal blow."

Fatal or not, the combatants must go still one more round. The focus will shift from Arkansas to Louisiana, where two lawsuits have been filed. The first has been brought by the state to have the statute declared constitutional. The second, brought by the ACLU, seeks the opposite result.

Will the Louisiana case simply be a rerun of the Arkansas trial? Not according to Bird, who was not involved in Arkansas but who is one of the state's attorneys in Louisiana. He described the Louisiana statute as a "different bill with a different purpose."

Different Statutes

While the two statutes were based on the same model, they do differ in several respects. Many of the differences tie the Arkansas statute more closely to religious issues. For example, the Arkansas statute declares that it exists for "the purpose of protecting academic freedom for students' differing values and beliefs; ensuring neutrality toward students' diverse religious



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Prof. Alan Dershowitz

Moving from Arkansas to Louisiana

convictions; ensuring freedom of religious exercise for students and their parents; guaranteeing freedom of belief and speech for students; preventing discrimination against students on the basis of their personal beliefs concerning creation and evolution; and assisting students in their search for truth." The Louisiana statute's stated purpose is to "protect academic freedom."

The Arkansas statute further clarified the definition of creation science by requiring the teaching of "sudden creation of the universe, energy, and life from nothing," "separate ancestry for man and apes," and "the occurrence of a worldwide flood." The Louisiana law requires only the teaching of evidence and inferences that support creation.

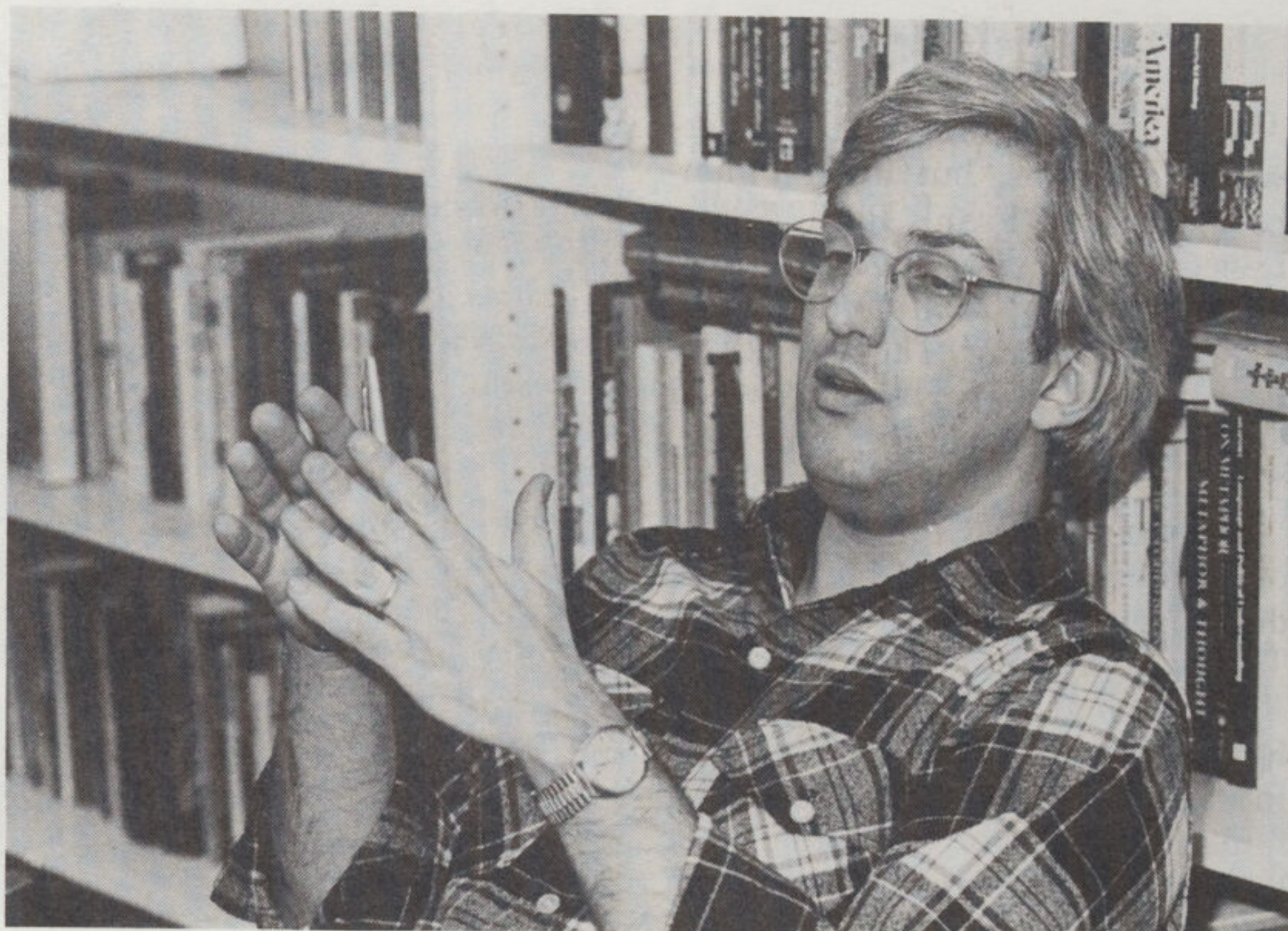
Finally, the Arkansas law included a number of "Legislative Findings of Fact," among them that, "Evolution-science is contrary to the religious conviction or moral values or philosophical beliefs of many students and parents," and that teaching only evolution "hinders religious training and moral training by parents." The Louisiana statute contains no such findings.

If these features of the Arkansas bill helped Overton conclude that its actual purpose was to introduce the Biblical account of creation into the classroom, the Louisiana law may represent a more formidable challenge to the ACLU.

But Novik, who is one of the attorneys for the ACLU in the Louisiana case, views the two laws as substantially the same in purpose and effect. He asserted that the creationists "own semantic games prove our point," explaining that the creationists "try to camouflage the fundamental religious core in a flurry of scientific evidence."

Science or Religion?

The central issue of debate in the controversy revolves around the question whether creation science



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Prof. Richard Parker

is independent of and separable from creation religion. Creationists generally believe that the earth and life on it came into existence suddenly about 6,000 years ago. Evolutionists believe that the earth is billions of years old, and that life evolved slowly over millions of years.

Bird, stressing that the balanced-treatment law prohibits the use of religious teachings or books, explained his view that religion and creation science are separable, maintaining that creation scientists have evidence that points toward sudden creation of the earth and life, and refutes the theory of evolution. "Creation science is as nonreligious as evolutionary science. Teaching creation science along with evolutionary science does not violate the establishment clause because the purpose and effect is

to teach all scientific evidence of the subject of origins and to provide academic freedom for students to choose."

Another argument made by creationists is that evolution is as religious as creation. They point out that belief in God does not automatically make one a creationist, because many religions hold views consistent with evolution. These religions use the Biblical account as an allegory but rely on evolution to explain the process of origins. Thus, creationists claim that evolution and creation are equally religious, since both views are consistent with religions. Said Bird: "Government action can be consistent with religion, it just cannot be the main purpose."

Bird sees creation science and religion as separate concepts: "I am
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HLS Four Tell of Narrow Escape

By Erich Merrill

Most law students don't look forward to exams, but John Palenberg, 3L, and Frank Roth, Bryan Lessley and Chuck MacDonald, 2Ls, were happy to be around to take them last semester. The four nearly perished in their Harvard-owned Holden Green apartment on Dec. 11.

Palenberg, who recounted most of the story of the four's brush with death, said the saga began on Thursday morning, Dec. 10, when Roth woke up feeling sick. "I drove Frank to the infirmary and the infirmary diagnosed his dizziness and nauseousness as symptoms of stomach flu. Frank came back home and went to bed."

McDonald also awoke feeling ill, but decided to go to class, since Thursday was the last day of the semester. "I came home and was eating breakfast when Frank came back. Frank told me what was wrong with him, and I said, 'I kind of feel the same way.' As I ate breakfast I felt worse and worse, and by noon, I also went to bed."

Palenberg and Lessley felt fine all day Thursday, and after spending most of the day on campus, returned to the apartment to find their roommates not feeling any better. MacDonald had started vomiting continuously during the day.

At about 11:30 that evening, Palenberg began to feel a little "queasy and tired. So I went to bed, thinking, 'Oh no, stomach flu; I hope I don't get it'."

Rotten Time for the Flu

Friday dawned, the first day of reading period. All four felt terrible, and didn't get out of bed until the phone rang. Palenberg went to answer it. "I picked up the phone, sat down in the chair, and my head collapsed onto the table. I was out three or four seconds. I didn't think anything of it; I just thought I was tired." Palenberg had been missing a lot of sleep to finish a paper which he turned in just before



E.M.

Bryan Lessley, Chuck MacDonald, Frank Roth, 2Ls, John Palenberg, 3L, and the flu.

reading period, and explained that often he would fall asleep at the table after spending all night on the paper. "After I finished the phone conversation, I walked across the living room to go back up the stairs and I fell down, and was out for 15 minutes, according to the clock on the table. Meanwhile, the clock was ticking in the background. Finals were approaching. I thought, 'What a rotten time to catch the flu'."

The Phone Rings Twice

Later in the morning the phone rang again. This time Lessley went to get it, but when he answered it, "I couldn't pronounce words. I was almost crying. I collapsed twice on the sofas on the way to the phone. Each time I realized I wasn't going to get any further, so I decided just to stop where I was." Regarding Lessley's condition that morning, Palenberg noted that, "When Bryan came back upstairs, it looked like he was dancing. He was in convulsions, like he was having an epileptic fit. His arms were kind of jerking. He looked like a rabbit when you hit it over the head with a club."

Peter Knapp, 2L, to whom Lessley had spoken on the phone, went over to the apartment to see if he could talk the four into going to the hospital. By the time Knapp arrived with a cab, the four were extremely ill. Roth explained, "You would fall asleep very easily. You'd conk out, then you'd sleep for hours. We were all very dizzy, and our pulses raced. I took mine once while I was just lying in bed, and it was between 92 and 100."

During the morning, all four were very short of breath, had tremendous headaches, and had a ringing in their ears. Roth said they started losing their vision. "You'd be reading the paper or something, and you'd look up and couldn't see. You'd see white for a while."

Fading Concentration

Palenberg said his ability to concentrate faded. "That was the insidious thing. We lost the capacity to realize these weren't all symptoms of the classic flu."

MacDonald, who was racked by constant vomiting, agreed. "I couldn't put it together. If I had realized there was a cab there waiting to take me to the hospital, I

From Mysterious Deadly Ailment

would have gone." Knapp, who had exclaimed, "This house smells like death," when he arrived, tried to get the four to get out of bed and go to the hospital, but they convinced him that they would be better off if they stayed home and slept off the flu.

By early afternoon, MacDonald felt so bad that he decided to go to the infirmary. "I looked in the mirror and I had broken blood vessels all over my face. I called Peter, who said he'd call a cab."

Roth and Lessley helped MacDonald down the stairs, and sat in the living room waiting for the cab. While the three waited, Roth, thinking about Knapp's comment, remembered that he and MacDonald had tinkered with the apartment furnace on Wednesday evening. As Palenberg explained, "Chuck and Frank went into the basement, and in an attempt to conserve on our heating costs, inspected the heating system. They found an unmarked lever on a flue which was full of holes and seemed to be taking heat outside. They turned it, not being sure what the result would be, but thinking it would cut down on heat which was being wasted."

Roth reminded Lessley of the change, and Lessley went up to get Palenberg out of bed. "I said, 'John, I think we've got a gas problem. Come on, you're going to the hospital with us'."

Out of Control

"I remember pulling on my shoes, and stumbling against the wall," said Palenberg. "I crumpled down the stairs. I couldn't get control of my nervous system. When we came out, the cab driver was sure we had all been on drugs. Our eyes were dilated, we could barely walk, and after I slumped into the cab and fell back against the divider, I was too weak to close the door. Chuck had to get out and close it. The funny thing was, on the way to the infirmary we began to feel better."

The four were still in bad shape

when they arrived at the infirmary, though, and Palenberg was taken into the building in a wheelchair. The doctors shared the cab driver's feelings. "The first question they asked us," said Palenberg, "was 'Have you been taking any drugs?' I answered, 'Yes, aspirin'."

Roth told the doctors they thought they might have a gas problem, and the four were put in a room to sit for a while. In less than two hours, three had recovered almost completely, while MacDonald remained badly dehydrated. He stayed in the infirmary that night, but the other three went home.

None Would Survive

That night the gas company sent someone out to look at the exhaust flue. He replaced the corroded portions of the pipe, and locked the exhaust damper open. Palenberg said he told them that normally the exhaust would have backed up into

the furnace, which would then have cut itself off, but the holes in the pipe let the exhaust escape into the basement, so the automatic cut-off didn't have a chance to work. He also told them that had they spent that night in the house, probably none of them would have survived.

Upton Understanding

The next morning they went to see Dean Upton, hoping they could delay their exams. "She was very understanding," said Palenberg. "We expected some resistance but she asked us what we needed to do, and rescheduled some of our examinations. She even offered to put an asterisk on our transcript if we suffered any calamities, and explain that we had almost been asphyxiated for 48 hours during the reading period." One of the exams she rescheduled was Palenberg's in Estate Planning. "Let's just say that somehow rescheduling that one seemed very appropriate."



HLS Financial Aid Planning Still on Hold

There is little news about the future of student loan funds for the 1982-3 school year. Assistant Dean Russell Simpson said that the bill which was passed in the state legislature this week authorizing the issuance of tax-free bonds to fund student loans may not be terribly helpful. The state will not be a guarantor of these bonds, he said, and the educational institutions which will guarantee them have lower credit ratings than the state. As a result, the interest rate will be higher than on a state bond and, when a percentage point or two is added on to cover reserves and administrative costs, the interest rate charged to students will come close to commercial rates.

The Law School is still unsure how many students will be affected

by the changes in federal regulations which will make federal loans contingent on a showing of need unless the student has been independent of his or her parents for two years. Financial Aid Officer Marion Ruiz said that, because she received only 200 responses to a survey she distributed in the fall, her information may not be representative of the financial situation facing students. Without a better guide to the number of students who will lose federal loan funds, and with the federal regulations for next year not due out until June, the Law School's planning is left up in the air, where it has been for six months.

J.M.



A Back Bench Opens in the New Hark

By Erich Merrill

Last night beer flowed out the taps and into the glasses of law students, faculty and non-law graduate students at the grand opening of "The Back Bench," the long-awaited pub in Harkness Commons. On hand for the occasion were members of the Somerville Bar Review, who held their weekly meeting in the new facility; the "Bud Man," who bombarded customers with door prizes; and Dean Vorenberg, who had been invited by Dorm Council president Mandy Lowell, 3L, to open the pub by cutting a red ribbon. At the end of the evening, two tickets to tonight's game between the Seattle Supersonics and the Celtics were to have been given to a student as the grand prize.

Just the Beginning

The opening of the pub was the final step in the first stage of a program the Dorm Council and administration have undertaken to renovate the Hark and to increase its use by students. During Christmas break, student mailboxes were moved from the Langdell tunnels into the Hark, and dākā set up facilities to sell doughnuts and coffee

by the mailboxes. "All indications are that the change has been fantastic," said John Lojko, food services director for dākā. Doughnut and coffee sales were an immediate success, and have been increasing 10% each week. Lojko also indicated that sales in the cafeteria upstairs were up during the first week of January, though they declined last week "because all the 1Ls left after exams."

Dean of Students Mary Upton was also pleased with the increased student use of the Hark. She said that if the pub is a success and students continue to frequent the cafeteria, a second stage of improvements will begin next summer.

Dorm Council Acts

The Dorm Council was the moving force behind the pub and supplied the funds for building the bar in the Swain Room and purchasing refrigeration equipment. According to Lowell, the Council has spent about \$4000 so far on the pub.

The Law School repainted the Swain Room on Wednesday and was to have constructed a partition separating the pub from the main hall in the Hark in time for the grand opening. Lowell said the fluorescent lights the University re-

cently installed in the Swain Room are too bright for a pub; the administration hopes to solve the problem by installing sleeves to cover the bare fluorescent tubes.

Lowell also pointed out that the decor for the pub is not complete. The wall behind the bar will be covered with enlargements of old pictures of the Law School, some going back to the beginning of this century. Once the pub has been finished, student musicians will be invited to play on certain nights. Lowell said that anyone interested in performing should contact Dave Moser, 2L, the pub manager.

Name Contest

"The Back Bench" was chosen from over 100 names for the pub submitted by students. Some of the other suggestions were "Roscoe's," "Quartroom," "Sleepy Jim's," "Kingsfield's," "Palsgraf's," "The Multistate Bar," and "The Dart of Harkness."

The next major event in the Back Bench will be Superbowl Night. The pub will open one half hour before the beginning of the game on January 24. Dākā will provide subs and other food.

Hours for the pub are 9-12:30 Monday through Thursday, 4 to 12:30 on Friday, and during sports-casts on weekends.



Mugging Puts 3L in Hospital

Rob Irving, 3L, was mugged between Austin and Langdell Halls around 11:00 p.m. on Friday, Dec. 18, while returning home from the Law School library. According to Dean of Students Mary Upton, Irving was attacked by two young white males, who "blindsided" him, knocked him unconscious and stole his backpack and wallet.

After the attack, Irving apparently made his way back to Langdell and contacted the police, possibly with the help of another student. The police took Irving to Stillman Infirmary, where he remained for four days while recovering from his head injuries.

Irving stated that he is uncertain of exactly what happened during the attack. "I really don't remember anything from the time I left the library until the next morning when I awoke in the infirmary," said Irving. He suspects that he was knocked unconscious; he had a tooth knocked out in the mugging, presumably from an unconscious fall to the pavement.

The assailants have not been identified or apprehended, though the backpack was later recovered near Peabody Museum, several hundred yards from the scene of the assault.

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Law in a Land with Few Lawyers

By Elizabeth Stong

Imagine a legal profession having fewer than 6,000 lawyers, organized in practice groups of no more than 30, located only in large urban areas, and serving a nation with one billion citizens. This situation exists today in the People's Republic of China, Mr. Ma Ronjie told HLS students on Jan. 8.

Ma, until now a criminal defense lawyer, served as counsel at the request of the Chinese government for Mao Zedong's widow, Jiang Qing, during the Gang of Four trial. Ma's legal career earlier earned him 10 months in solitary confinement and six years of hard labor during the Cultural Revolution. He is spending this year as a visiting professor at the University of Minnesota Law School and is studying to become a commercial lawyer.

The changing views of the roles of lawyer and legal profession in the PRC are reflected in Ma's career. Because his father had served as a general in the Nationalist Chinese army, Ma was unable to enter the foreign service academy and had to pursue a less prestigious occupation. He entered the Peking University Law School in 1950 and graduated in 1954. As lawyers trained under previous regimes were barred from practice, he became one of the first three

active lawyers in the PRC, he told an East Asian Legal Studies luncheon.

Despite the absence of an organized legal profession, the period before 1954 was a time of great reform, and law was used to consolidate the government and "protect reform movements," Ma said.

Between 1954 and 1957, the number of active lawyers increased from three to 3,000, and many significant laws were enacted in an effort to "guarantee economic development." At this time, the lawyer's role in Chinese society expanded. This period of "hope" and "optimism" was killed following the "Let 100 Flowers Bloom" movement when "rightists," including lawyers, were suppressed.

For the next 10 years, "many people thought 'law has no use,'" Ma continued. As one of just four lawyers allowed to practice during that period, Ma worked on important criminal cases in Beijing and dealt with foreigners.

"Total Destruction"

The advent of the Cultural Revolution in 1966 brought, in his words, the "total destruction of law and destruction of the constitution," as well as his seven years of re-education. Beginning in 1976, China again focused its attention on developing its law. Important substantive and procedural criminal codes were enacted, and the courts and procuracy, "smashed" by the Gang of Four, were reconstituted. In 1978, Ma was allowed to resume legal practice.

At present, the Chinese legal system centers on the people's legal advisory offices, which are state organs under the Ministry of Justice. These 10- to 30-lawyer offices receive clients through court referrals and on a walk-in basis.

According to Ma, China is able to manage with so few lawyers because there is little inclination to refer problems to them. Instead, informal mediation and arbitration are generally used to resolve all but the most serious matters.

Clients pay their fees to the government, which pays salaries to the lawyers. Ma believes this system protects the independence of lawyers by avoiding the dangers of corruption and bribery, but he criticizes it as well: "If some [lawyers] work hard, and some are lazy, they still make the same money. Then maybe the hard worker becomes lazy, too!"

Advocate and Judge

In response to questions concerning the Gang of Four trial, Ma noted that Chinese lawyers have a duty to serve their clients. But lawyers there are also entitled, and expected, to make an independent assessment of a client's guilt and to convey their assessment to the court, he said. "Of course," he added, a "client has the privilege to fire the lawyer."

Ma is pleased with the result of his lawyering in that case. "I believe the 'Gang of Four' are criminals," he stated, "but I do not think Jiang Qing should be killed." Her sentence, death with a two-year suspension, will probably result in life imprisonment, he said.

Several aspects of the American judicial system drew Ma's praise. He especially noted the quality of care received by the prisoners in the New York jails he visited, citing their good food and coffee, and commented on the leniency of their sentences. He stated that he witnessed a trial in New York City where the defendant got just five years for shooting a policeman.

Ma drew sustained applause during a talk in Prof. Cohen's China law course when he related Chief Justice Burger's observation to him that the fundamental aspect of the American judiciary is its independence from the executive and legislative branches of government.

In concluding his remarks, Ma said that he found the most important lesson of the American judicial system engraved over the portal of the Supreme Court building: "Equal Justice Under Law."

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AILSAs: Feeling Winds of Change

By Tiane Sommer

"Windwalker" made its Boston area debut last Friday night at a showing in Pound 101. Set in 1791, the movie portrayed the intertribal feuding and harsh struggle for winter survival among two small groups of the Cheyenne and Crow peoples. Within that setting, the film provided an authentic, if necessarily limited, depiction of their culture. An interesting feature of the production was that apart from some spoken English, the language of the Cheyenne and Crow was used, with English subtitles.

Over 150 people crowded in to see the screening of "Windwalker," which was sponsored by the American Indian Law Students Association (AILSAs). Besides evoking empathy by its icy winter setting — the audience braved a below-freezing night to learn about Indian issues — the characters and action elicited numerous sympathetic responses which culminated in applause at the finish. The full

story will not be divulged here, but those who missed last week's show will be comforted to know that the film is scheduled to open at Boston-area movie theaters this week.

Many who attended paid a two-dollar donation, which covered the film's rental fee. Some, turned away for lack of space, could still sip hot cider available at the front table and read the material there about current American Indian legal issues and activities.

A Different View

The well-attended showing signalled the start of an active 1982 calendar for the American Indian law group. Yesterday AILSA brought Michael Myers to ILS 3 to speak on "The Rights of Indigenous People in International Law." Myers represented the Six Nations Iroquois Confederacy during the September, 1981 Conference on Indigenous People and the Land, held in Geneva by the United Nations

International Non-Governmental Organization. His discussion was accompanied by a short film about the Mohawk Nation's movement toward self-determination, entitled "Akwesasne: A Different Point of View."

AILSAs is now developing an Indian Law symposium to be held about the third weekend of March. Prominent practitioners and scholars in the field have been contacted for the panels, and the lineup awaits final approval of a detailed program by the HLS administration. The theme is expected to touch on the connections of American Indian law with international law.

Finally, AILSA is continuing its work on the paper recycling project it sponsors along with the Environmental Law Society. The main collection box has been moved with the mailboxes to the Hark. This may facilitate dove-tailing of the paper recycling efforts with work on moot court briefs and third-year papers — at least with respect to rough drafts.

INSTITUTE OF POLITICS STUDY GROUPS— SPRING 1982

Registration: February 3-9, at the Institute,
Kennedy School, 79 Boylston St., 495-1360

- Communications Policy-Making in the New Media Era
- Proposition 2½ and Reaganomics at Work in Massachusetts
- Government vs. the News Media: A View from Both Sides
- The Cuban Revolution: 1959 to the Present
- The Second Stage: Transcending Sexual Politics
- Economic Growth/Economic Justice
- Curbing the Courts: The Limits of Judicial Power
- Gay Politics in a Straight System
- Southeast Asia after 1975: Peace or War?
- U.S.-Israel Relations: Prospects for the Mid-Eighties
- The U.S. Foreign Policy Decision-Making Process
- Going for Governor: The 1982 Massachusetts Race
- The Nuts and Bolts of Political Campaigns

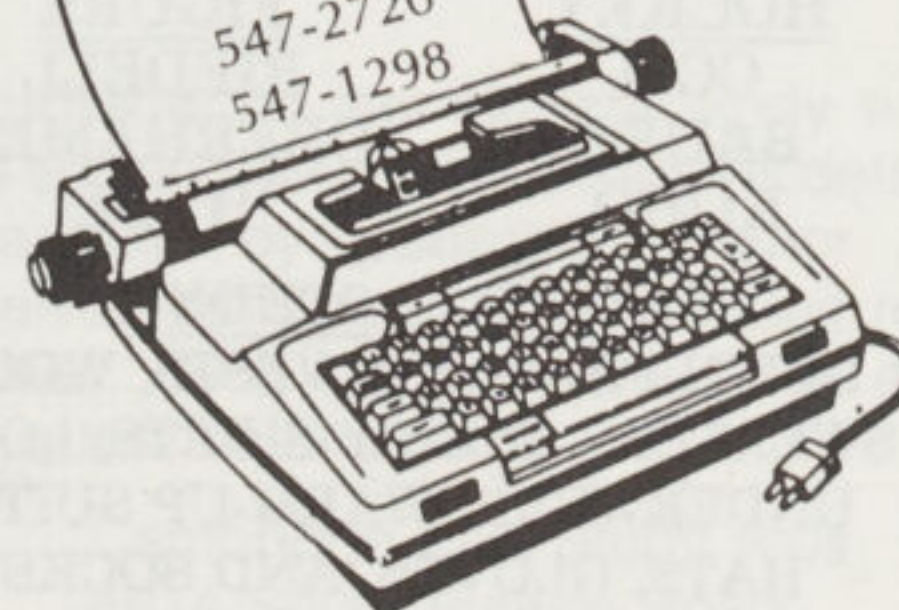
Groups are non-credit and extracurricular, and open to all students throughout the University. A brochure describing the study group program is available at the Institute.

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Review Plan: No Quotas, No Yale Plan

(Continued from Page 1)

a personal statement, they must be "close" to those that would have put the student in the top four or five in a section. The second new element of the resolution is a "sunset" provision which will see this plan expire in 1986 unless it is extended.

End of Lengthy Debate

Unless the faculty takes some action which will require the *Review* to reconsider or reformulate its plan, this vote will bring to an end the intense debate that has consumed much of the *Review*'s attention for a year since the staff first voted for affirmative action last February. Both *Review* President Mark Helm, 3L, and Prof. Detlev Vagts, who heads the faculty committee in charge of making recommendations regarding the *Review*, said that it was unlikely that the faculty would try to block implementation of the plan.

Vagts said, "I do not have the sense that the faculty is going to rise up on its hind legs and condemn it — or commend it." In the spring, there was discussion at the faculty meetings of doing whatever was necessary to prevent the scheme from being implemented. Vagts said he thought the faculty would probably see the current plan as being "within the range of the *Review*'s autonomy." He added that his committee might recommend adoption of the Michelman Committee's proposal of last spring that the School end the practice of automatically sending the *Review* the names of the top students in each section.

Effect on Faculty Relations

Helm was hopeful that the faculty would make no move to impede implementation of the plan. "We've done our best to iron out the things they objected to. No one can assail the process by which we developed the plan," he said Monday.

As for the change in the grade-forwarding process, he said, "It

would clearly be something we could live with." He did think it might adversely affect the *Review* though. "There is a certain prestige in that we know for sure the very top people get onto the *Review*." He said that he feared that prestige might be harmed by such a faculty move.

Requiring students to request that their transcripts be sent to the *Review* could also symbolize a deterioration in relations between the *Review* and the faculty that Helm said would be unfortunate. "If it comes to be seen as a divorce [between the faculty and the *Review*] it will affect whether we feel we can go to faculty members for help," he said.

The resolution adopted last week provides for the possibility that the faculty may vote to stop automatically forwarding the names. If that happens, the *Review* will appoint an "analyst" to select the top students on the basis of the transcripts submitted by students. This independent analyst would protect the confidentiality of the records.

If this scheme were used, the *Review* could not be sure it was choosing all the top students, but Helm thinks that most top students would choose to submit their records and that the effect on the quality of the *Review* staff would be minor.

Less Drastic Changes

Aside from the use of the personal statements and the switching of the writing competition to the spring, the process of selection would not be fundamentally changed under the new plan. Eighteen students would be chosen by the writing competition and 18 would be chosen on the basis of grades while a fall writing competition is in effect. If a spring writing competition is held, 20 (the current number) would be chosen by each means so as to allow for the likely overlap of the two groups. (First-year students would participate in the contest before receiv-

ing their spring term grades and thus would not know if they would qualify for membership on the basis of grades alone.)

Students submitting personal statements may ask the *Review* to consider the fact that they are members of "an historically under-represented racial or ethnic group" or that they have overcome "economic, societal, or educational obstacles." Sex will not be considered in the selection process.

The statements will be submitted either in conjunction with a student's grades or with his or her writing competition entry. Students may submit statements for use with both grades and competition entries, but these applications will be considered separately.

(Continued on Page 12)

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Two Thoughts on the New Hark

The Hark is coming back to life! The mood in the halls of Walter Gropius's creation has changed completely since we left in December. Students stand in bunches around their mailboxes; they stand in line for coffee and doughnuts; and more and more of them have been eating upstairs, even before the Pound cafeteria was closed to students. In short, the building is being used much more and students appear to be more satisfied with the facility.

There are two lessons in the transformation of the Hark which should not be lost as the process of renovation continues. The first is that students can make very tangible improvements in the Law School when they organize. The idea of a pub has been pushed by students for some time, but was discouraged by the Administration. The persistent effort of the Dorm Council — and its investment — is paying off now. It should be an example to other students.

The second observation we make is that the effects of changes in a social environment such as the Law School are often impossible to predict. Moving the mailboxes to the Hark was bound to increase traffic there, but who would have guessed that people would line up to pay for coffee outside the Law School Coop when it is offered for free across the sidewalk in Pound! Even more difficult to anticipate are the effects of changing the elements of an atmosphere. We know that people will line up at the Pound Cafeteria for the same food that, in the Hark, draws nothing but derogatory remarks. The difference is the mood of the two areas, of course.

With the rest of the Hark awaiting renovation — and particularly now that Pound cafeteria will be closed to students — it is essential that the School work to improve the atmosphere in the Hark. With an inviting eating area, the food operation could become more economically viable and we could break out of the vicious circle that sees meal prices driven up because of insufficient use, which in turn is caused, in part, by prices. It is not impossible to construct an appealing eating environment: One has only to see the number of law students sitting in the Science Center's Green House every morning to realize that it can be accomplished in relatively simple ways in a campus setting. The Harkness Building certainly has the potential. The challenge now is to try to realize that potential. We think there is a crucial role for students in this process, for whatever changes are made will have to be closely watched and assessed. We hope the Dorm Council will continue to lead the way in this process.



HARVARD LAW RECORD

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Fenno

Fenno strode through the double doors and was hit by a blast of frigid air. He turned left at the corner and leaned forward into the icy wind that drove in from the north. He turned up his collar, but it was no use. The insistent cold numbed his extremities while the tall glass windows rattled to his right and left.

"Goodness me," Fenno thought, glancing at the shivering scholars around him in the Langdell Reading Room. "I wonder what it's like *outside*."

Fenno thought he recognized a down-covered wretch slumped in a chair. "Hey Will, wake up! Don't you know if you fall asleep in this cold you might never get up?"

"F . . . F . . . Fenno . . . help . . ."

"C'mon, Will, take off that snazzy blue ski mask and speak English. I can't understand a word you're saying."

"That's no mask, Fenno," Will said, struggling to consciousness. "That's my face."

Several brandies later Fenno's friend was back to normal. "I've been in that chair for three days now," he said. "If you hadn't found me I never would've made it."

"I don't understand. Why don't you just go home?"

"Litigation Workshop." Will brushed aside a frozen tear which skidded across the reading table. "It was okay for the first week. We jump-started the Xerox machines to keep warm. But then they went dead and all we could do was burn old Tax notes in the Root Room."

"That's terrible."

"You bet it is. And what's worse is that I'm the only person I know who has any real work to do this month."

Fenno looked around and saw that Langdell had the population density as well as the climate of North Dakota. He left the brandy with his friend and went off to look for heat.

He found it in Pound where two teams of students were coming to blows in the well of a packed classroom.

"This is the worst proposal I've ever seen!" one student raged across the table.

"You ignorant slut," another returned. "You wouldn't know a decent offer if it sat on your face!"

"What is this?" Fenno whispered to a back row observer. "Negotiation Workshop?"

The student shook his head. "No, it's a new course — Workshop Workshop. It's to teach effective role-playing technique. We act out the parts of law students acting out parts in other January term courses."

"Oh," said Fenno as the chief union negotiator kicked over the table and drew a switchblade. "How are they doing?"

"Not bad, but no one's going to win an Oscar. That 'ignorant slut' line has really become a cliché."

Fenno bundled up and headed for Georgie's and his favorite pinball machine. In pinball there are no roles, only quarters, and the lights will always keep you warm.

Another Carol

To the Editor:

Your publication of "The 12 Days of a Legal Christmas" [RECORD, v. 73, n. 9, Dec. 4, 1981] prompts me to recall a caroling session which was unique in its time.

Around Christmas of 1964, my first year in the law school, some friends of mine and I (none of whom had any kind of singing voice) decided to celebrate the season by caroling. We recruited a few young ladies from Lesley and serenaded (!?) the locality.

Having been appropriately greeted in a few places, we decided to invade the library. We sang two or three selections, one of which was a "Legalistic Christmas Carol" which I wrote to the tune of "Adeste Fideles."

To our amazement, activity in the library stopped while we were singing. We even were applauded. As we turned to go, however, the pre-Christmas studying resumed.

For your archives, I set forth the words of my carol:

"Oh adverse possession, contracts and
tortfeasance
Are all combining to drive me wild.
But this is nonsense
Born of Erwin Griswold,
So why don't we forget it (repeat)
Come on, let's all forget it!
Christmas is here!"

Bardin Levavy, '67
Upper Montclair, N.J.

Speak Up

A copy of the following letter to Dean Vor-
enberg was sent to the RECORD — Ed.

Dear Jim,

We enjoyed listening to your presentation on Tuesday, December 8, 1981, before the Washington, D.C. Harvard Law School Alumni Association. We found your comments concerning the current educational issues confronting the school, and your review of the activities of the Michelman Committee, to be thoughtful and surprisingly thorough given the brief time you had available. It was interesting to observe the reactions to your presentation by a group whose outlook is decidedly different than our own — those who spoke are, for the most part, separated from what Harvard Law School is like today by many years, and their views are, in any case, of a more conservative bent than our own.

We were troubled by the implications of what you said, and more so by what you did not say, regarding the *Law Review's* commitment to some form of affirmative action plan. In your response to the inevitable question on this issue, you began by stating you would not address the merits of affirmative action in general, then stated your

view (again, without discussing the merits) that the adoption of any affirmative action plan by the *Law Review* would be "unwise."

Although we recognize the difficulties of dealing fairly with such a controversial issue in a forum such as an alumni association luncheon, we view your refusal to comment even briefly on the merits of the question as a serious and damaging omission coming from one in your position.

There is no doubt that blacks, chicanos, native Americans and other minorities, and women, have historically been and still are disadvantaged in our society. Discrimination exists in innumerable and subtle forms. It is the result not only of express prejudice, but also of the structure of a society founded on racist and sexist attitudes. Its effects are most invidious in our educational system. If one accepts these observations as true (as we suspect you do), then one must concede that performance, as evaluated by the traditional educational system, is not a true measure of the capabilities or potential of those who have been so disadvantaged. The incorporation of affirmative action as a goal by the *Law Review* in the selection of its members is a long overdue recognition of that fact.

Beyond the inadequacies of the current admission criteria as an indication of intellectual capacity or potential for performance as an editor, there are several independent reasons for seeking to diversify the membership of the *Law Review*. To begin with, political viewpoint and personal experience inevitably color an individual's perception of the legal system and exercise of legal analysis, despite the desire for and sincere efforts toward objectivity. Consistently divergent views within the Supreme Court, particularly evident in the past decade, are but one example of this phenomenon. It is becoming increasingly evident that the viewpoints and experiences of minorities and women on many issues are vastly different than those of most white males. The insights and ideas of these individuals are especially important given the substantial influence of the *Law Review* upon practitioners, jurists, legal scholars, and all those affected by the legal system.

Secondly, although, as discussed above, we believe the present selection system has many shortcomings, it is indisputable that membership on the *Law Review* entitles one to special training and carries with it an aura of prestige that holds both present and future value. If such resources are to be distributed, they should be distributed equitably. The disadvantages faced by women and minorities cannot be eradicated until they become an integral part of all levels of society. The special opportunities associated with membership on the *Law Review* undeniably help provide access to certain levels of society from which minorities and women have been historically excluded.

Finally, it is impossible to ignore the subtle effects that historical exclusion from an "elite" organization has on the self-perception of individuals in those excluded groups and upon the perceptions others have of those groups. As the Supreme Court noted in *Brown v. Board of Education*, the psychological effects of exclusion may be lasting and debilitating.

If one accepts these goals and the concept of affirmative action, one must recognize that they are impossible to achieve unless any actions are taken on an across-the-board basis. It is destructive to these goals and, indeed, hypocritical to carve out exceptions for any organization, particularly one such as the *Law Review*, which is an integral part of the system which most fundamentally affects the structure of our society.

Given the complexity and urgency of the issues surrounding affirmative action, we believe it is inappropriate to comment upon the recent actions of the *Law Review* while specifically declining to discuss the merits of affirmative action in general. We would hope that in the future when you are called upon to address the *Law Review's* consideration of affirmative action, you will not again ignore discussion of the merits.

Peter Hosinski, '81
Arlington, Va.

Nancy Wieggers, '81
Washington, D.C.



The RECORD's policy on letters is simple. We read all of them. We print most of them, subject only to editorial discretion. We encourage letters on any subject, and especially on subjects which have appeared in the RECORD.

Letters must be typed and received by 6:00 P.M. the Tuesday before each issue. We prefer letters of no more than 700 words.

The RECORD has chosen (David) Brad Hudson, 1L, as Co-Managing Editor for Volume 74. He will join Erich Merrill, 2L, who will stay on in that position. The Editor-in-Chief's sincere efforts to find a replacement for himself have proved fruitless and so his name, along with the others in the masthead, will remain right where they are for the time being.

J.M.

Great Moments in the Law

[Defense lawyer Mary Welcome] referred to police official Morris Redding as Otis Redding, the famous entertainer.

Once, she asked a witness why he had, in an earlier hearing, called the splash beneath the bridge "a loud splash," only to refer to it this week as "a pretty loud splash." Which, she wondered, was the truth.

"And this is December, isn't it?" Welcome once asked. The witness corrected her.

-from an account of the Atlanta trial of Wayne Williams, *Boston Globe*, Jan. 10, 1982, p. 6.

The Committee will return materials for those applicants selected for membership to the analyst, and destroy the remainder.

-from the *Law Review's* final affirmative action plan, ¶4d

[Aren't unsuccessful applicants entitled to due process before such harsh treatment?]



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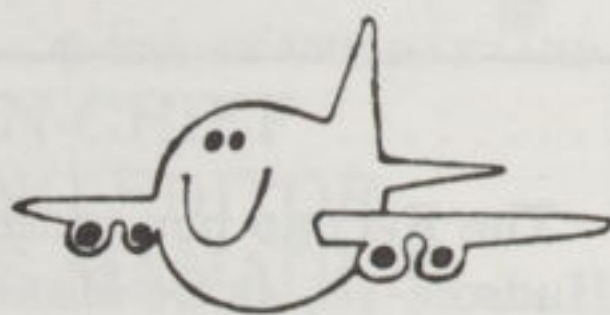
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Plan to Take Effect This Year

Continued from Page 9)

The new plan includes for the first time a rough guide for what grade point average will be acceptable under the affirmative action criteria for membership. The resolution says:

"No applicant will be chosen if his or her grades or writing competition entry do not indicate to the Membership Committee that he or she can adequately perform *Review* work. Grades will serve as an indicator of ability to perform *Review* work only if they are close to grades that would qualify a student for membership [by virtue of being in the top four or five persons in a section]."

This paragraph appears to be intended to answer the concerns of some faculty and *Review* members that members might be chosen un-

der the affirmative action provisions who would have significantly poorer academic records than other editors.

"Yale" Plan Dropped

The *Review* decided against going ahead with plans to allow some second-year students to become editors by submitting notes for publication because some other schools have found that their journal editors have tended to pick friends too often. Helm also said that there was some question whether this process would lead to members being chosen on the basis of the kinds of views they held.

Beyond these specific problems, Helm said people thought they might be taking on too much at one time by including this twist along with the affirmative action plan.



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Legal Services Institute Will Likely Close

(Continued from Page 1)

judge" the "major issues" raised in recent faculty meetings on the future of clinical instruction at HLS.

Vorenberg said this week that he has made contact with some legal services offices, but negotiations are still tentative. He hopes to present the faculty with a proposal by mid-March at the latest. He said that there are no other plans now under study for new clinical programs for *next* year.

But there is considerable debate about the long-term provision of clinical experience at Harvard. The Michelman Committee on Educational Planning and Development is charged with presenting recommendations on the subject later this winter. The faculty discussed clinical education at two meetings in December. Dean Vorenberg, describing the meeting as "a good full discussion," said that the sessions provided "a lot of grist for the Michelman Committee's mill." Prof. Duncan Kennedy, a strong supporter of clinical education, recalled that the two meetings were "quite contentious, and showed considerable division within the faculty on the future of clinical education." The faculty, however, will not be able to consider and approve recommendations of the Michelman Committee in time to institute them next fall.

Ideal Plan

The Legal Services Institute was an educational venture on a far broader scale, with loftier goals, than the temporary office placements that may be available to students next year. The Institute was a venture of HLS, Greater Boston Legal Services and Northeastern University Law School. Harvard and GBLS made a four-year pact, according to HLS Financial Officer Paul Upson, by which Harvard agreed to contribute \$600,000 over four years, along with \$100,000 of books and equipment. Harvard and Northeastern would also provide specified faculty services. Students from Harvard and Northeastern

first worked and studied at LSI in September 1980, though the office had been providing community services since January 1979.

The staff in 1979 worked out of an old house on Centre Street in Jamaica Plain. The lawyers handled neighborhood cases but were also assembling a library, putting together form books and desk references, and generally working to establish a practice from scratch. Graduate students at MIT prepared analyses of the community and its institutions.

In 1980-81, 24 full-time third-year students worked at the center. They handled cases under the supervision of Harvard and Northeastern faculty, and attended classes there in the lawyering process, substantive poverty law and the legal profession.

Mixing Study and Practice

Clinton Bamburger, one of the four staff attorneys, said that the primary goal of the Institute was to integrate fully the study and practice of law, but there were subsidiary goals. One was to prepare students for legal services careers. The Institute would give them an idea of what the work entailed, and those who chose to pursue it after graduation would need less training on the job.

Another goal was to provide a model for legal education elsewhere. Harvard gave the world the Langdellian Socratic method, and the Institute's founders thought that a successful meshing of practice and teaching might likewise be emulated to good effect.

Dean Vorenberg believes that the greatest success of the Institute was "to begin to show the possibilities of a form of integrated practice and teaching through what you might call total immersion . . . The biggest failing is not one of LSI but of the world around it — the climate and availability of jobs in legal services looks so grim at the moment."

Vorenberg continued: "[One] piece of unfinished business is learning

whether it would be possible to provide educational qualities of the kind offered by the Institute at more modest per-student costs."

Harvard's Involvement

The four-year financing pact was to expire in December 1982. So Harvard will end up spending seven-eighths of its \$600,000 and \$100,000 in-kind commitment, according to Paul Upson.

Of the 24 students in 1980-81 at LSI, Bamburger said that nine were from HLS. This year there are 14 full-time students, and Bamburger believed that six were from Harvard. This academic year 17 Harvard students will spend 16 to 20 hours per week at LSI during one semester as part of the Introduction to Advocacy course.

Bamburger explained that LSI would have preferred to enroll more HLS and Northeastern students full-time this year. He said that the Institute staff should have done a better job of acquainting students with the program, and also guessed that many 2Ls might have believed LSI to be open only to students who planned to enter legal services work on graduation. There was no such restriction on enrollment, though LSI did seek students who might pursue a legal services career.

Quality Faculty

Jeanne Charn, director of the Institute, was not available for comment. Other members of the staff there include Prof. Gary Bellow, who holds a tenured position on the HLS faculty, and Karl Klare and James Rowen of Northeastern Law School. Last fall, *The American Lawyer* listed the "top" 15 young law professors in the nation, and two of them were affiliated with LSI. Klare was named along with Bill Simon, who recently left LSI for a post at Stanford Law School. Besides the staff attorneys, there are six paralegals at the Institute, which now occupies a portion of an

(Continued on Page 15)

Another Tale of Overcrowded Courts

—Benne Hutson

Sporting the largest number of teams in recent memory, this season's edition of intramural basketball has the potential to be one of the best ever. However, such high hopes may not be realized due to recent cutbacks in the availability of Hemenway Gymnasium for use by the Law School.

According to Athletic Director Pat Fischer, 2L, over 50 teams from HLS are involved in this year's program. The squads are dispersed over four men's leagues, a women's league and a newly organized coed division.

"The turnout has produced eight more teams than last year," said Fischer, "and, as far as we know, this is the largest number of teams ever."

Can't Serve Everyone

However, the extensive participation has raised a number of novel problems. In the past, the league accommodated teams not only from HLS but also from the Graduate School of Arts and Sciences (GSAS) and the Kennedy School as well as local alumni squads. This year, such teams found themselves on the outside looking in.

Fischer said there were a number of reasons for limiting the league solely to teams composed of law students. "First of all, there were just too many teams. In order to maximize court time for law students, we had to make this decision," Fischer commented.

"In addition," Fischer continued, "the other graduate schools do not contribute to being referees or helping out in the other organizational aspects of the league. The extra 12 to 15 teams that would exist would be very burdensome."

New League Formed

The decision encountered much criticism from those adversely affected. In response, GSAS has organized its own league and has

procured the use of Hemenway Gym for every Wednesday evening of the coming semester.

News of this new league and the concomitant cutback in the number of hours available for Law School use reached Fischer during last semester's finals. He did not learn of the extent of the loss of playing time until two weeks ago.

"Because GSAS owns the building," stated Fischer, "they have taken away one full day of available court time which is approximately eight hours of playing time. The result is that some Law School games will begin as late as 11 p.m., and some will be played on Friday evenings. In addition, there will be less time set aside for women to exclusively use the court to practice."

When asked about any possible long-run remedies, Fischer said, "There is not much of a solution to the problem of getting enough hours for Law School use. The Athletic Department has been very helpful in getting us as many hours as possible at present. There does not appear to be much more of an immediate solution possible."

Current Status

As for actual play in the leagues, two weeks of competition were concluded prior to last semester's final exams. The season will resume in February after the conclusion of the winter term.

The four men's leagues are divided according to respective athletic abilities. Standings for each of the leagues have not yet been made available. Fischer is in the process of realigning the leagues so that actual talent levels are roughly equalized. According to Fischer, "There have been a few blow-outs which show that some teams are in the wrong division."

"A" league features the premier talent of HLS with a number of former college varsity performers taking part. There are tentative

plans for the champions of this division to take on the Business School winners at the end of the year.

Coed Innovation

Newly added to this year's format is a coed division. Under the league rules, each team must have at least three women on the floor at all times. Popular clamor led to the formation of this league and so far it has met with a generally favorable response. There is a possibility of a coed all-stars game against a team of faculty members later this season. Fischer says this event is presently in the planning stages.

In addition, the women's league is the largest ever, boasting a total of eight teams. This will grow this semester, as teams from GSAS will be included. Although GSAS has formed a separate league, it did not have enough teams to sponsor competition in either a women's or a coed division.

A shortage of referees has plagued the league in the past and this year is no exception. "We are still looking for officials," says Fischer. When asked about conduct in the games thus far, Fischer commented, "There have been no major problems. The quality of the refereeing has been fine. In addition, because the referees have been given more power and discretion to enforce peace, there has been less fighting and fewer violent incidents." Some of the extraordinary powers given to officials include temporary benching of players and the ability to declare a completed game forfeit, no matter what the final score, if problems erupt afterwards off the court.

The regular season is scheduled to end the day before spring break. Playoff action will culminate in title games two weeks after classes resume. Schedules are posted in Hemenway and at the Dorm Council bulletin board in Langdell.

LSI's Fate

(Continued from Page 13)

old industrial building at 3529 Washington St., Jamaica Plain. Bamburger estimated the potential client pool in the community at 40,000.

Bamburger has taken a new job for next year. He will be a professor at Maryland Law School, and will work closely with clinical programs there. He speaks of the program he is leaving as a great experiment in legal education. And he says that the issue before the faculty is whether it will find a suitable replacement or will confine clinical training to part-time placement in offices unaffiliated with the university.



SPORTS QUIZ

NOTE: This week's Sports Quiz reviews the events of 1981. Each question lists a number of teams. The object is to determine what each team had in common during 1981.

1. University of Wisconsin, University of Michigan, University of Arkansas, University of Miami (Fla.) and Penn State.
2. Minnesota North Stars, Houston Rockets, New York Yankees and Philadelphia Eagles.
3. Buffalo Bills, San Diego Chargers, Philadelphia Eagles and Dallas Cowboys.
4. Detroit Red Wings, Washington Capitals, Colorado Rockies, Winnipeg Jets and Hartford Whalers.
5. Milwaukee Brewers, Kansas City Royals, Philadelphia Phillies and Houston Astros.

Answers on Page 16

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From Arkansas to Louisiana

(Continued from Page 3)

personally opposed to teaching the Biblical account of creation in the public schools. I simply see [the law] as allowing academic freedom."

Novik, however, rejects the assertion that creation science is separable from religion: "There is no such thing as scientific evidence independent of what it is trying to prove." He stressed that the law requires the teaching of evidence of creation, and that creation requires a creator — God. Because the theory of creation requires a creator, it cannot be divorced from religion. Said Novik, "Scientific creationism is religion, and it has no place in the public schools."

Dual Model

Novik explained that the concept of creation science is premised on a "dual model" that has only two alternatives — either evolution or creation must be the correct explanation of origins. Creationists then advance their claims by attacking gaps in evolutionary theory, citing them as evidence that creationism is correct.

But Novik argued that "uncertainties in sciences don't prove creation." He said that science is a process that is always in flux. Evidence that contradicts parts of a theory should lead to further examination of the theory and exploration of little-understood processes, not wholesale rejection of the theory.

Novik also commented on the appeal of the creationist argument to a sense of fairness — requiring a balanced approach to competing theories seems fair to most people. He asserted that creationists play on different meanings of the word "theory."

In the vernacular, said Novik, "theory" means only a disputed fact. But in science, a theory is a description and explanation of the way things work based on the available evidence — it is tentative, flexible and open to revision.

But he maintained that the "theory" of creation science has no flexibility — it has all the answers, i.e., "God did it," and is not open to revision or change.

Novik also discussed the argument that because some scientists believe in creation science, it is only fair to teach it. "Science is a meritocracy," he said, "not a democracy." When a theory works, that is the theory that is used.

In the Arkansas case, Overton rejected the two major creationist arguments: that creation science is not religious, and that evolution science is just as religious. He did not accept the dual model's premise that evidence contradicting evolution supports creation.

Professors React

HLS Prof. Alan Dershowitz expressed some concerns about the Arkansas decision. While he agrees with the result in the Arkansas case, Dershowitz feels uncomfortable with some of its implications, especially those touching free speech and academic freedom. "I see it differently than other civil libertarians," he said, "and I see it as a far more complicated case."

Dershowitz explained that, while civil libertarians generally favor diversity, this case starts out as anomalous because it results in removing a point of view from the classroom. Quoting from Justice Powell in *Gertz v. Robert Welch, Inc.*, Dershowitz said, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction, not on the conscience of judges and juries, but on the competition of other ideas."

Dershowitz believes that such disputes are best resolved in the "marketplace of ideas," but that the problem arises when one view is a religious view. "The answer we've generally come up with is that that conflict cannot occur in the public schools — it must occur between the church and the schools, but outside the public schools."

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Creation Science Argument Evolves

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To that extent, Dershowitz feels the case was decided correctly. But he has reservations: "In the end, I'm not convinced that it's a victory for freedom of speech, for freedom of expression, for freedom of intellect, but it is a narrow victory against the establishment of religion."

Dershowitz described two examples of cases that he feels would be more difficult to decide. The first is that of a teacher who decides on his own that he wants to teach both evolution and creation. The other is that of a student who learns evolution and then writes an exam saying that he believes that the theory of evolution is incorrect.

Besides its requirement of balanced treatment, the Louisiana statute has provisions covering both of these hypothetical cases. One prohibits discrimination against a teacher who chooses to "teach scientific data which points to creationism." The other protects the student who "demonstrates a satisfactory understanding of both evolution science or creation science and who accepts or rejects either model in whole or part."

In the upcoming Louisiana case, the court may find itself addressing these two issues separately from the question of whether a state can require the balanced treatment of

creation science and evolution science. The statute contains a severability clause, declaring that if a part of the statute is declared unconstitutional, it is simply severed from the law, leaving the rest intact.

Another View

HLS Prof. Richard Parker rejects the view that the issue is one of academic freedom. "I think it's entirely appropriate for the political process to focus on what ought to be taught." Citing public education as one of the most important functions of the state, he said, "Inevitably, public education involves discrimination among viewpoints and a judgment that some are more important than others." Given this discrimination, Parker feels that the content of public education is "an appropriate issue for public politics, and not simply for expert determination."

Characterizing the debate over whether creationism can be bifurcated into religious and scientific aspects as fruitless, Parker recommended a more functional approach. He focused on the process by which the law was enacted and its effect on powerful, entrenched interest groups.

Said Parker, "Nothing is religion, independent of its origins and

effects." For him, a relevant analysis would ask two questions. First, was the law a result of the activities of a powerful, entrenched interest group or widespread public support? And second, to what extent would the teaching of creationism alongside evolution further entrench such a group?

Parker described the controversy as involving a fundamental problem with the establishment clause: once it has been broadened beyond the mere prohibition of a state religion, what is its purpose? Also, how far can we extend it without interfering with the right to free exercise of religion?

Both professors agree that the balanced treatment statute raises many complex and subtle issues, and both are critical of creation scientists and the ACLU for oversimplifying these issues. Dershowitz believes that these issues "deserve to be faced by people who are concerned about the diversity of views and maximizing the student's opportunity to think things through himself or herself."

But perhaps Parker put it best: "In this case, when you first see it on television, it seems so simple, but when you give it a little bit of thought, it becomes very complicated."



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SPORTS ANSWERS

1. Each of these schools' football teams knocked off the top-ranked team in the country at various times during the 1981 college football season. As to the facts, Wisconsin beat Michigan, Michigan beat Notre Dame, Arkansas beat Texas, Miami beat Penn State and Penn State beat Pittsburgh.
2. Each of these teams lost in the championship round of the major professional sports leagues during 1981.
3. These are the only teams to make the 1981 National Football League playoffs who also made the 1980 playoffs.
4. These are the only five teams who did not make the National Hockey League playoffs in 1981.
5. Each of these teams lost in the strike-induced 1981 divisional mini-series held by major league baseball.

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